RE CHEW SIEW KHIM (f)

[O.C.J. (McGilligan J.) May 29, 1964]

[Kuching — Civil Application No. 1 of 1964]

Crown Proceedings Ordinance (Cap. 47), s. 24A — Proceedings for certiorari and mandamus — Certiorari to remove proceedings of probate officer — Grounds for — Powers of probate officer — Administration of Estates Ordinance, (Sarawak Cap. 80 of 1946 Rev. Edn.).

In this case the applicant applied for orders of *certiorari* and *mandamus* to remove to the High Court for the purpose of being quashed the decision of the probate officer in refusing to grant letters of administration to the applicant of the estate of Lu Kim Fatt deceased and for an order of *mandamus* requiring him to grant letters of administration of the estate in favour of the applicant alone or jointly with her brother.

Held: (1) in a proper case *certiorari* will lie to remove to the High Court the proceedings of a probate officer for the purpose of being quashed;

(2) in this case as there was no excess or want of jurisdiction on the part of the probate officer or any error in law on the face of the record or any breach of the rules of natural justice, the application for *certiorari* and *mandamus* must be dismissed and refused.

Cases referred to:—

(1) *Foo Sam Teck* v. *Probate Officer, Simanggang* [1960-63] S.C.R. 17.

(2) *R.* v. *Nat Bell Liquors* [1922] A.C. 128.

APPLICATION FOR ORDERS OF *CERTIORARI* AND *MANDAMUS.*

T. O. Thomas for the applicant.

D. M. Goodbody (Deputy Public Prosecutor) for the Probate Officer.

Cur. Adv. Vult.

McGilligan J.: This is an application for orders of *certiorari* and *mandamus* brought on behalf of Madam Chew Siew Khim, the widow of Lu Kim Fatt, deceased, who died intestate in April, 1963, leaving quite a substantial estate in Sarawak. It is an application for (I quote from the notice of motion)

"an order of *certiorari* to remove into this honourable court for the purpose of being quashed the decision of the probate officer, Kuching, dated 10th September, 1963 refusing to grant letters of administration to the applicant of the estate of Lu Kim Fatt (deceased) and for an order of *mandamus* requiring him to grant letters of administration of the said estate in favour of the applicant alone or jointly with her brother Chew Guan Hin."

In Sarawak the law relating to probate and the administration of the estates of deceased persons is contained in the Administration of Estates Ordinance, which is one of the Ordinances omitted from the 1958 Revised Edition of the Laws of Sarawak but still in force; it is Chapter 80 of the Revised Edition of 1946. Under it the Registrar of the High Court is the probate officer for Kuching in respect of all estates other than Malay and Dayak estates.

Before the Registrar as probate officer (in the rest of this judgment I shall refer to him merely as the probate officer) there were on the 6th and 10th of September, 1963, proceedings as to who should be granted letters of administration to the estate of Lu Kim Fatt, deceased. At the end of these proceedings the probate officer recorded the following words:—

"Having heard evidence, I am prepared to issue L/A to both the widow Chew Siew Khim and Madam Soh Mui Lan, the auntie."

There is no doubt that the High Court here has power in a proper case to make orders of *certiorari* and *mandamus*. Subsections (1) and (2) of section 24A of the Crown Proceedings Ordinance [section 24A was inserted in the Ordinance by the Crown Proceedings (Amendment) Ordinance, 1961] read as follows:—

"24A.—(1) It is hereby declared that proceedings by way of *Habeas Corpus ad Subjiciendum, Mandamus, Prohibition* and *Certiorari* shall be available in Sarawak, and shall be deemed always to have been available in Sarawak, since the 1st day of January, 1957, to the same extent and for the like objects and purposes as they may, from time to time, be available in England.

(2) Except in the case of applications for *Habeas Corpus ad Subjiciendum*, an application for any of the remedies specified in subsection (1) shall, until Rules of Court otherwise provide, be regulated by the procedure applicable in the Queen's Bench Division of the High Court in England to that remedy, with such modifications as may be necessary to adapt it for use in the High Court."

It is, of course, the High Court in England which has power there to make orders of *certiorari* and *mandamus*.

In *Foo Sam Tek* v. *Probate Officer, Simanggang* [1] there is a decision by the Court of Appeal of Sarawak, North Borneo and Brunei, given on the 29th of August 1960, that (I quote from the judgment of the Chief Justice, Sir John Ainley) "in a proper case *certiorari* would lie to remove to the High Court the proceedings of a probate officer." This decision is binding on this court, and I accordingly rule that there is power in this court in this case, if it thinks fit, to order that the proceedings in which the probate officer decided to grant to the applicant and Madam Soh Mui Lan jointly letters of administration to the estate of Lu Kim Fatt, deceased, be removed into the High Court for the purpose of quashing the order or decision to make the said grant. In the instant case letters of administration have not in fact been issued to anyone, and I may say that I was not, (indeed am not) certain that in the circumstances this application is not premature. There has been, in effect, a refusal by the probate officer to grant letters of administration to the applicant, but what is really complained of, and what in the application itself is asked to be quashed, is the decision of the probate officer that letters of administration should be granted to the applicant and Madam Soh Mui Lan

jointly. It seems to me arguable, that the probate officer's discretion is not exercised until the grant has been made and letters of administration actually issued. The section (section 9 of the Administration of Estates Ordinance) says that the probate officer "may issue the grant". It is in issuing (or refusing to issue) the grant that he exercises his jurisdiction, and it might be considered that *certiorari* does not lie in respect of the decision (or what in fact is a statement of willingness) to issue a grant, until the decision has in fact been acted on. However, as the Court of Appeal decided that *certiorari* could lie in *Foo Sam Tek*, where also the letters of administration had not been issued and the facts were somewhat similar, I must accept that *certiorari* does lie in this case also. In the rest of this judgment I shall refer to the probate officer's decision to grant letters of administration to the applicant and Madam Soh jointly (which decision implies a refusal to issue it to her alone) as the decision of the 10th of September 1963.

The first question to be answered is whether an order of *certiorari* should issue in this matter to the probate officer. It is only if the answer is in the affirmative that the court need or can consider whether or not also to make an order of *mandamus*.

Let us now return to that decision of the 10th of September 1963. I repeat the probate officer's words:—

> "Having heard evidence, I am prepared to issue L/A to both the widow Chew Siew Khim and Madam Soh Mui Lan."

The applicant did not in writing express her objections to this decision until the 3rd February 1964, when a letter was written by her advocates, Messrs. Thomas & Co., to the probate officer, stating that she objected to the granting of letters of administration to Madam Soh Mui Lan, and proposing that the letters be granted instead to the applicant together with her brother Mr. Chew Guan Hin (who was stated to be a bank clerk). With this letter from Messrs. Thomas & Co. was enclosed one from the applicant herself to the probate officer, requesting that letters of administration be granted to her, either alone, or jointly with her brother, Chew Guan Hin. On her letter is an endorsement by Mr. Chew Guan Hin that he agrees to be an administrator, if appointed. The probate officer replied by letter of 7th February stating that (for reasons given) that he was not prepared to alter the previous decision.

In the proceedings before the probate officer on the morning of the 6th of September 1963 the applicant and Madam Soh Mui Lan each asked for letters of administration to be granted to her. The applicant stated that she could not read or write in English and Chinese, and Madam Soh said she "knew a little Chinese." Later they both agreed that letters of administration should be granted jointly to the applicant and one Lee Keng Meng, Capitan China of 17th Mile Simanggang Road.

On the afternoon of the 10th of September 1963 Mr. Lee Keng Meng appeared and declined to be an administrator, suggesting instead one Ho Chua Boon. This the applicant objected to. She also said that her deceased husband and Madam Soh Mui Lan's husband were not related, but just had the same surnames. She then said "If they are related I will agree to letters of administration being granted to Lo Kee Seng." Mr. Lo Kee Seng is, it appears, the son of Madam Soh.

Later the same afternoon a Mr. Tan Khee Khoi came before the probate officer and gave evidence. It does not appear in the record that he was sworn or affirmed, but the probate officer used the words "having heard evidence", and as *Omnia praessumuntur rite et solenniter esse acta*, I presume that it was in fact evidence which the probate officer heard. Mr. Tan Khee Khoi said in effect that he knew of his own personal knowledge that the deceased and the husband of Madam Soh Mui Lan were brothers from the same parents. This was evidence that Madam Soh was the sister-in-law of the deceased, not his aunt or 'auntie', as the probate officer consistently called her.

In his first affidavit of the 27th of April 1964 the probate officer stated that he did not grant letters of administration to the applicant alone because she was illiterate, and so not fit to carry out without assistance the duties and functions given to administrators by the Administration of Estates Ordinance, and he accordingly decided to make the grant jointly to the applicant and Madam Soh, "the auntie of the deceased".

As I have said, the applicant stated before the probate officer that Madam Soh's husband and her husband were not related. In her further affidavit of the 30th of April 1964 (further to her supporting or grounding affidavit of 3rd April 1964) she averred that she had received from China two letters in Chinese characters, dated respectively the 20th and the 24th of September 1963, from her deceased husband's sister, who stated in them that her brother, the applicant's husband, had no brothers in Sarawak; that these two letters were produced at the subsequent hearing, but that the probate officer did not care to look at them. Two letters in Chinese were exhibited in and annexed to her affidavit.

In his further affidavit of the 2nd of May 1964 the probate officer states that to the best of his recollection neither of the two letters was produced to him at the subsequent hearing, which he takes to be that of the 10th of September 1963;

that he cannot be sure whether or not after that hearing on the 10th of September the applicant produced the letters to him in his chambers; but that, if she had, he would have asked for English translation to be provided.

The written grounds on which relief is sought are these:

"(1) That the probate officer was wrong in law in insisting that the applicant should share the letters of administration with Madam Soh Mui Lan.

(2) That the probate officer was wrong in refusing to grant the letters of administration to the applicant alone or jointly with her brother.

(3) That the probate officer exceeded his jurisdication in requiring the applicant to accept letters of administration together with Madam Soh Mui Lan.

(4) That the probate officer acted in a manner contrary to the principles of natural justice in that he did not look into any of the two relevant letters from China produced to him by the applicant during the proceedings, as to whether Soh Mui Lan is an auntie or not."

I can say at once that I am disregarding in my considerations the letters alleged to be from the deceased's sister in China. They are said to be dated the 20th and 24th of September 1963, and so could not have been produced during the proceedings before the probate officer on the 6th and 10th of September, 1963. There was no "subsequent hearing" after the 10th of September and it is impossible to say to what occasion the applicant is referring when in paragraph 4 of her further affidavit she uses those words. I am satisfied that the probate officer never refused (improperly or at all) to consider the letters put forward by the applicant with her affidavit.

I here wish to make it clear that what the court is primarily concerned with is the proceedings before the probate officer on the 6th and 10th of September 1963, when the decision to grant letters of administration to the applicant and Madam Soh jointly was made. If that decision cannot be faulted, the fact that nearly five months later the applicant in writing requested the probate officer to alter his decision, and make a new one, cannot affect the position. It is the decision of the 10th of September 1963 which the applicant seeks to have quashed, and the crucial question is whether or not there are grounds for the court to make an order of *certiorari* to have it quashed. If it was a good and unimpeachable decision on the 10th of September 1963, the refusal on the 7th of February 1964 to alter it because the applicant asked that her brother be substituted for Madam Soh as a co-administrator does not make it any less good and unimpeachable. The question is: was it or was it not good and unimpeachable?

I am indebted to both learned counsel for their arguments and for the assistance of the many cases to which they referred me. The basic principles concerning the order of *certiorari* are, however, (as counsels' arguments and the cases underline) very clearly set out in *Halsbury's* Laws of England (Volume II of the Third edition), and it is not necessary to go any further for a statement of the appropriate law.

"*Certiorari* lies at common law to remove [to the High Court] for the purpose of quashing such proceedings, the proceedings of inferior courts of record or other persons or bodies exercising judicial or quasi-judicial functions" (*Halsbury* third edition, Volume II page 128). The grounds on which *certiorari* to quash will lie may be summarised as follows (from pages 142 *et seq* of the same Volume II):

(i) Excess or want of jurisdiction;

(ii) Bias by interest;

(iii) Breach of the rules of natural justice;

(iv) Fraud and perjury;

(v) Proceedings improperly brought before the inferior court, tribunal or person exercising judicial functions;

(vi) An error in law apparent on the face of the record.

It is clear that in this case only grounds (i), (iii) and (vi) have to be considered.

It is my opinion and judgment that there was here no excess or want of jurisdiction on the part of the probate officer. His powers come from sections 8 and 9(1) read together, of the Administration of Estates Ordinance. Those sections read as follows:—

"8. The following persons, if of full age and of sound mind, are entitled in the order stated to letters of administration to a deceased person's estate:—

(a) the deceased's widower;

(b) the male heirs of the deceased;

(c) the decased's father;

(d) the brother or brothers of the whole blood of the deceased;

(e) the deceased's widow (or primary widow if more than one);

(f) the deceased's nearest male relative;

(g) the deceased's nearest female relative;

(h) any creditor of the deceased, who shall enter into a bond for such amount and with such sureties. or has furnished such security, as the probate officer shall require.

9.—(1) If, in the opinion of the probate officer, the person or persons entitled to probate or letters of administration is or are unfit to act, he may issue the grant to the person or persons next entitled, or to any suitable person or persons who may be willing to act."

If the probate officer was bound to grant letters of administration simply in accordance with the table set out in section 8, and had no discretion to make a grant to persons other than those entitled under section 8 he would have no judicial function, and there would be no question of an order of *certiorari* being made to him. It is his discretion to make a grant to others when the person entitled is, in his opinion, unfit to act, which is his judicial function. How then can it

be said that by granting administration to someone other than the person *prima facie* entitled he has exceeded his jurisdiction? In fact here he decided to grant letters of administration to the widow of the deceased, together with another person, whom he accepted as a relative of the deceased. I have no doubt that the power given by section 9 does empower the probate officer, as well as to grant letters of administration to a person or persons other than the one entitled, to grant them to the person entitled and another. As far as the record goes (and presuming Madam Soh Mui Lan's husband to be dead or not available) the applicant is (under paragraph (e) of section 8) the person *prima facie* entitled to administration. Certainly she is not claiming otherwise.

Learned counsel for the applicant argues further, however, if I understood him right, that as the probate officer had no good reasons for coming to the opinion that the applicant was unfit to act alone, or for deciding that a grant should be made to the applicant and Madam Soh jointly, therefore he acted in excess of his jurisdiction. His argument here I take to be (remembering that in considering all grounds for *certiorari* other than error of law the court is entitled to take affidavit evidence into account) that the probate officer erred in that his reason for deciding against a grant to the applicant alone, and for one to her and Madam Soh, was that she was illiterate, when the only evidence as to Madam Soh's literacy was her own statement that she knew some Chinese, and further in that he was influenced by his mistaken belief that Madam Soh was the aunt of the deceased. What learned counsel is really saying is that the probate officer came to the wrong opinion and to a wrong decision for unsound reasons.

In my opinion the court cannot inquire as to whether the probate officer wrongly exercised his discretion or wrongly used his jurisdiction, except on one of the grounds other than excess or want of jurisdiction. To do so would be to treat the matter as if it were an appeal from the probate officer's decision. In the case of *Foo Sam Tek* v. *The Probate Officer, Simanggang,* already referred to, Sir John Ainley said:—

"The probate officer, and it seems the probate officer alone, had jurisdiction to determine whether the applicant was or was not fit to act as administrator, and he exercised his jurisdiction. Whether the decision of the probate officer was wise or not, whether it was a decision which could have been upset upon an appeal by way of rehearing are not matters which concern us, or concerned the learned judge. Simply there was no excess of jurisdiction."

The Privy Council case of *R.* v. *Nat Bell Liquors* [2] is also to the point. The first part of the head note reads as follows:—

"A conviction by a magistrate for a non-indictable offence cannot be quashed on *certiorari* on the ground that the depositions show that there was no evidence to support the conviction, or that the magistrate has misdirected himself in considering the evidence: absence of evidence does not affect the jurisdiction of the magistrate to try the charge....."

Later in the judgment (on page 151) it is said —

"It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see...."

Clearly in the instant case, even if the probate officer had based his decision solely on what he mistakenly believed to be the fact that Madam Soh was an aunt of deceased, it would have been a wrong exercise of jurisdiction, not an act in excess of, or with want of, jurisdiction.

For these reasons I rule that in these proceedings of the 6th and 10th of September 1963 (and, if it be considered part of the proceedings, the refusal of the 7th of February 1964) the probate officer did not act in excess of his, or with want of, jurisdiction.

Next, I shall deal with whether or not there is any error in law on the face of the record, as that point can be shortly dealt with. In my judgment anything and everything the probate officer did he had jurisdiction and power to do; there is no error of law apparent on the record in this, or in any other, respect.

I now come to the last remaining ground, that there was a breach by the probate officer of the rules of natural justice. I have already said that I am disregarding the letters allegedly from China, and therefore the applicant's written ground 4 fails. However, I understand it to be also the argument of learned counsel for the applicant that the probate officer, in accepting that Madam Soh was literate on the strength of her saying she knew some Chinese, in being strongly influenced by his mistaken belief that she was an aunt of the deceased, and by disregarding the applicant's objection to Madam Soh's being made a joint adminsitrator, displayed a disregard of the fundamental conditions of the administration of justice, and failed to adhere to the rules of natural justice.

I would agree that if the conduct of proceedings by an inferior court or tribunal or person exercising judicial functions has been flagrantly wrong or obviously unjust then there may be reason for an order of *certiorari* on the ground that the rules of natural justice have not been complied with — if, for instance, there was a calculated refusal to hear relevant evidence or receive vital information; or even perhaps if there was a wilful or a reckless misconstruing of all the evidence, or of all the information put forward, and a decision wilfully come to in a completely and obviously false and inaccurate basis. But there was nothing like that here. The probate officer undoubtedly does seem to have assumed (wrongly as far as can be judged from the record) that Madam Soh Mui Lan was the aunt of the deceased. But there was evidence before him that Madam Soh was the deceased's sister-in-law (a closer relation, incidentally, than an aunt-in-law) and that would make her son (present at the proceedings on the 6th of September) a nephew of the deceased; and all in all the probate officer seems to me to have acted quite reasonably. First, he does not wish to give letters of administration to the applicant alone, because she is illiterate (a very valid reason for coming to the opinion that a person entitled is unfit to act). Then the suggestion is that she and Mr. Lee Keng Meng shall be joint administrators; to this the applicant agrees. But Mr. Lee Keng Meng, when he appears, does not wish to be administrator and suggests a Mr. Ho Chua Boon instead of himself; the applicant, however, will not accept Mr. Ho. She at this time also states that Madam Soh is not any relative of her deceased's husband, but that — if she is — she will accept Mr. Lo Kee Seng, Madam Soh's son, as co-administrator. The probate officer then calls for and receives evidence showing that Madam Soh is a relative of the deceased, in fact his sister-in-law. He thereupon decides to grant administration jointly to Madam Soh Mui Lan (still under the title of auntie) and to the applicant. There is nothing on the record to show that the applicant at that time objected to the decision, when made, and she does not state in either of her affidavits that she then objected to it. I do not see how it can be possibly said that the probate officer in any way in his conduct of the proceedings or in coming to his decision was in breach of the rules of natural justice.

On all these premises I rule that there are no grounds for making an order of *certiorari* in respect of the proceedings before the probate officer on the 6th and 10th of September, 1963.

As to the later attempt to have the probate officer change his decision, I am doubtful that the applicant was entitled to try to re-open the matter five months later, and I am a bit at a loss as to why the letters of administration were never in fact issued. However, giving all possible allowance to the applicant, and accepting for the moment that the application for a change of decision and the refusal to change are part of the proceedings before the probate officer, I can see no reason why he should not refuse to alter his previous valid and reasonable decision. There was nothing wrong or impeachable in his refusal.

This application for orders of *certiorari* and *mandamus* is dismissed and refused.

Application refused.

SCHMIDT v. KEPONG PROSPECTING LTD. & ORS.

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) June 1, 1964]

[K.L. — Federal Court Civil Appeal No. 70 of 1963]

Contract — Jus quaesitum tertio — Stranger has no right to enforce contract — Lack of consideration — Uncertainty.

The appellant a mining engineer actively assisted in obtaining a prospecting permit for a Mr. Tan and was promised a tribute of 1% of the selling price of all iron produced and sold. Subsequently a company was formed to exploit the mining rights and an agreement was made in 1954 under which the company took over the obligation to pay the appellant the tribute of 1%. The appellant continued to assist the company as director and consulting engineer. In 1955 the company and the appellant made an agreement whereby the company agreed to pay the appellant the 1% tribute. The appellant claimed payment of the tribute due to him but his claim was dismissed. He appealed to the Federal Court.

Held: as the appellant was not a party to the 1954 agreement he had no right to enforce it; but the 1955 agreement gave him a right to recover the tribute from the company and this agreement was binding on the company as there was consideration for it in that the appellant had given and undertook to give his services to the company and it was not void for uncertainty.

Cases referred to:—

(1) *Ex parte Slater* 76 L.T. 529.

(2) *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847 at p. 853.

(3) *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1926] A.C. 446 at p. 468.

(4) *Shamia* v. *Joory* [1958] 1 Q.B. 448.

FEDERAL COURT.

A. L. Hills for the appellant.

P. J. Mooney for the first respondent.

Denis Murphy for the respondents (third parties).

Cur. Adv. Vult.

Thomson L.P.: This appellant is a mining engineer who, metaphorically speaking, went on a journey from Jerusalem to Jericho. The first respondent (which I shall call "the company") is a limited liability company registered in the